PAUL J. AND LYDA R. STIVERS

IBLA 85-215 Decided July 22, 1986

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying Class I reinstatement of oil and gas lease and specifying conditions under which Class II reinstatement might be permitted. AA 48603-M.

Affirmed as modified.

1. Oil and Gas Leases: Reinstatement

A lease automatically terminated by operation of law pursuant to 30 U.S.C. @ 188(b) (1982) may be reinstated pursuant to 30 U.S.C. @ 188(c) if the lease rental has been paid within 20 days of the lease's anniversary date and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Inability to pay is not, in itself, a justifiable reason for failing to make timely payment.

APPEARANCES: Paul J. and Lyda R. Stivers, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Paul J. and Lyda R. Stivers have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated November 23, 1984, denying their petition for Class I reinstatement of oil and gas lease AA 48603-M. As grounds for denial, BLM's decision stated that the annual rental had not been paid or tendered within 20 days of the lease's anniversary date and, further, that appellants had not established reasonable diligence in making payment or a justifiable reason for delay in payment. Appellants contend in their statement of reasons that since payment was received within 20 days of the anniversary date that it was timely made.

The lease in question is for 160 acres consisting of the NE 1/4 sec. 7, T. 20 S., R. 1 W., Fairbanks, Meridian. It was created by partial assignment of noncompetitive oil and gas lease AA-48603 issued to Alaska Federal Petroleum Corporation on June 7, 1983, with an effective date of July 1, 1983. The partial assignment of the lease is dated July 14, 1983, and was approved by BLM effective September 1, 1983. BLM's decision approving the partial assignment stated that the assignees would be "responsible for payment of the annual rental on the assigned lands, beginning with the payment due July 1, 1984."

The present controversy arose when, by notice dated September 4, 1984, BLM informed appellants that their lease had terminated due to failure to pay rent by the anniversary date of the lease. The notice also informed appellants of their right to seek reinstatement. Appellants responded by letter dated September 16, 1984, in which they asserted that the annual rental had been paid and enclosed a copy of their cancelled check which was dated July 1, 1984. BLM replied by letter that the check had been received on July 13, 1984, in an envelope postmarked July 10, 1984, after the anniversary date of the lease. Appellants subsequently petitioned for reinstatement. BLM's decision and this appeal followed.

Termination and reinstatement of oil and gas leases issued under the Mineral Lands Leasing Act (MLLA) are governed by 30 U.S.C. @ 188 (1982). In relevant part, the statute provides, first, that "upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law * * *." 30 U.S.C. @ 188(b). Second, the statute provides that such a terminated lease may be reinstated if "such rental was paid on or tendered within 20 days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee * * *." 30 U.S.C. @ 188(c). Reinstatement under this provision is referred to as "Class I reinstatement." An additional provision permits reinstatement when rental is not paid or tendered within 20 days of the anniversary date of the lease and similar conditions are met or "no matter when the rental is paid after termination, it is shown to the satisfaction of the Secretary that such failure was inadvertent * * *." P.L. No. 97-451, Title IV, @ 401, 96 Stat. 2462 (1983) (codified at 30 U.S.C. @ 188(d)). Reinstatement under the terms of the latter provision is known as "Class II reinstatement." Reinstatements of leases are governed by the regulations appearing at 43 CFR Subpart 3108.

In the present case, appellants petitioned for Class I reinstatement and expressly declined to seek Class II reinstatement. As stated above, appellants' check was not received by the Minerals Management Service in Denver, Colorado until July 13, 1984. This was after the July 1, 1984, anniversary date of the lease but prior to the 20-day limitation for Class I reinstatement established by 30 U.S.C. @ 188(c) (1982). Thus, the record discloses that BLM erred in deying appellants Class I reinstatement on the ground that they had failed to tender payment within 20 days of the anniversary date of the lease and its decision must be modified accordingly.

BLM also denied reinstatement on the ground that appellants had failed to show that their failure to timely pay the annual rental was either justifiable or not due to a lack of reasonable diligence. The lessee bears the burden of showing that the failure to timely pay was either justified or not due to a lack of reasonable diligence. 43 CFR 3108.2-2(b). In their petition for reinstatement, appellants stated as their reason for delay that "we did not have the money."

Following enactment of the statutory provision permitting Class I reinstatement in 1970, the Department determined by regulation that: "Reasonable diligence normally requires sending or delivering payments sufficiently in

advance of the anniversary date to account for normal delays in the collection, transmittal and delivery of the payment." 36 FR 21035 (Nov. 3, 1971); 43 CFR 3108.2-1(c) (1972). This standard was adopted and followed by the Board. Louis Samuel, 8 IBLA 268 (1972). In 1983, however, the regulations were amended to provide:

> A remittance which is postmarked by the U.S. Postal Service, common carrier or its equivalent (not including private postal meters) on or before the lease anniversary date and is received in the proper BLM office or the designated Service Office, as appropriate, no later than 20 days after such anniversary date shall be considered as timely filed.

48 FR 33673 (July 22, 1983); 43 CFR 3108.2-1(a). Although the regulation uses the words "timely filed," because the statute provides for termination of a lease by operation of law "upon failure of a lessee to pay rental on or before the anniversary date of the lease," in William F. Branscome, 81 IBLA 235 (1984), we found that the regulation more properly defined the criterion for reasonable diligence. See Nancy Wohl, 91 IBLA 327 (1986) (concurring opinion). Appellants' payment was not postmarked until July 10, 1984, and they have not alleged that it was deposited in the mails any earlier than that date. Accordingly, we affirm BLM's determination that appellants did not show that delay in their payment was not due to a lack of reasonable diligence.

A terminated lease may also be subject to Class I reinstatement if the lessee shows that the failure to exercise due diligence was justifiable. Untimely payment is justified when sufficiently extenuating circumstances outside the lessee's control affect the lessee's actions in paying the rental and proximately cause the delay in payment. Dena F. Collins, 86 IBLA 32 (1985); William F. Branscome, supra; Louis Samuel, supra at 274. Inability to pay is not in itself a justifiable reason for failing to make timely payment. Dena F. Collins, supra at 35; Louis Samuel, supra at 274. Accordingly, we must find that BLM correctly determined that appellants failed to meet this requirement for reinstatement.

Appellants additionally urge this Board to reverse BLM's determination because they were "victims" of the company from which they purchased the assigned lease, which has now gone out of business, and loss of the lease will mean the loss of their investment. The MLLA requires the Secretary of the Interior to lease lands within any known geological structure (KGS) of a producing oil or gas field to the highest responsible qualified bidder by competitive bidding. 30 U.S.C. § 226(b) (1982). In Alaska lands within a "favorable petroleum geological province" must be leases competitively. 16 U.S.C. § 3148(d) (1982). Rules governing competitive bidding are established by regulation. See 43 CFR 3120. Lands available for leasing which are not within a KGS or a favorable petroleum geological province are leased to the first qualified applicant. 30 U.S.C. § 226(c). Such noncompetitive leases are issued under two programs established by the Department. See 43 CFR Subpart 3110. In general, non-KGS lands which have been previously leased are offered through the simultaneous filing program under which a list of parcels is posted in the state BLM office, applications are accepted, a drawing is held, and the applicant selected is entitled to make first offer

for the lease. See 43 CFR Subpart 3112. Other non-KGS lands are generally available for lease to parties making over-the-counter offers with the proper BLM office. See 43 CFR Subpart 3111. Whether by simultaneous filing or over-the-counter offer, a filing fee of $ 75 is required, and the first year's rental of $ 1 per acre or fraction of an acre must be paid. 43 CFR 3103.2-2.

In the present case, it appears that Alaska Federal Petroleum Corporation obtained its lease by making an over-the-counter offer. While appellants do not specify how they were victimized, it is clear that they purchased their assigned lease for substantially more than the $ 1 an acre rental for which it was originally obtained. While this Board sympathizes with appellant, our task is to decide whether there has been a proper, fair, and orderly administration of the program under the governing laws. See Gladys Walta, 91 IBLA 352 (1986).

An oil and gas lease for Federal land gives the leaseholder the right to drill for, extract, remove, and dispose of oil and gas deposits. It is valuable only to the extent that those with sufficient financial resources to conduct a drilling program deem the land a desirable prospect. Even if a well is drilled, little or no oil or gas may be discovered. Neither the Department, nor the United States Government of which it is part, is or can be the guarantor for those who expend their funds in the hope of success.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

James L. Burski
Administrative Judge

We concur:

Jerry Muskrat
Administrative Judge
Alternate Member

John H. Kelly
Administrative Judge.